Supreme Court, U.S.
FILED

No. 05-615 NOV 10 2005

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In The

Supreme Court of the United States

ABF CAPITAL CORP., a Delaware Corporation,

Petitioner,

v.

EDWARD J. OSLEY, JR. and RENEE PETERS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Where the highest court of a state has declared that in construing the scope of a contractual choice of law clause, the trial court must apply the law of the jurisdiction designated therein, can the court of appeals, in determining whether the district court, sitting in diversity, applied the correct statute of limitations in dismissing the plaintiff's complaint, simply assume that the enforceability of the choice of law clause requires that the statute of limitations of the designated jurisdiction be applied, without considering the law of the designated jurisdiction?

PARTIES TO THE PROCEEDING

ABF Capital Corp., a Delaware corporation, plaintiff and appellant below and Petitioner herein; Edward J. Osley, Jr. and Renee Peters, defendants and appellees below and Respondents herein.

CORPORATE DISCLOSURE STATEMENT

ABF Capital Corp., a Delaware corporation, has no parent corporation. No publicly held company has any ownership interest in ABF Capital Corp.

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CITATIONS OF OPINIONS AND ORDERS

The published opinion of the Court of Appeals for the Ninth Circuit is reported at *ABF Capital Corp. v. Osley*, 414 F.3d 1061 (9th Cir. 2005) (C.A. Nos. 03-56349 & 03-56352), decided and filed July 12, 2005, and is set forth in the Appendix hereto at App. 1-9. The unpublished Order Granting Defendant's Motion to Dismiss in *ABF Capital Corp., a Delaware Corporation, Plaintiff, vs. Renee Peters, Defendant* (Civil Action No. CV-02-09908 FMC (AJWx)) ("*Peters*"), entered April 10, 2003, is set forth in the Appendix hereto at App. 10-21. The unpublished Order Granting Defendant's Motion to Dismiss in *ABF Capital Corp., a Delaware Corporation, Plaintiff, vs. Edward J. Osley, Jr., Defendant* (Civil Action No. CV-02-09909 FMC (AJWx)) ("*Osley*"), entered April 11, 2003, is set forth in the Appendix at App. 22-34. The unpublished Civil Minutes – General in *Osley*, entered May 15, 2003, denying Petitioner's motion to alter or amend judgment, is set forth in the Appendix hereto at App. 35-36. The unpublished Civil Minutes – General in *Peters*, entered May 15, 2003, denying Petitioner's motion to alter or amend judgment, is set forth in the Appendix hereto at App. 37-39. The unpublished Order of the Court of Appeals for the Ninth Circuit, filed August 12, 2005, denying Petitioner's petition for rehearing, is set forth in the Appendix hereto at App. 40.

BASIS FOR JURISDICTION IN THIS COURT

The decision of the United States Court of Appeals for the Ninth Circuit, affirming the District Court's granting of Respondents' motions to dismiss under Federal Rule of Civil Procedure ("Rule") 12(b)(6), was entered on July 12,

2005, and its order denying Petitioner's late-filed but accepted petition for rehearing was filed on August 12, 2005 (App. 1; 40).

This petition for writ of certiorari is filed within ninety (90) days of the date of the Court of Appeals' denial of Petitioner's late-filed but accepted petition for rehearing. Revised Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1). ABF Capital Corp. first invoked federal jurisdiction in each of the cases below under 28 U.S.C. § 1332 (diversity).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1652:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

Petitioner, ABF Capital Corp., a Delaware corporation ("ABF"), subleased various oil and gas properties to two New York limited partnerships (the "Partnerships"), Oak Energy Partners ("Oak") and Regent Energy Partners ("Regent"), in both cases by instruments effective December 31, 1982 (the "Subleases"). Respondent Edward J.

Osley, Jr. ("Osley") purchased six (6) units of limited partnership interest ("Units") in Oak on December 29, 1982, while respondent Renee Peters ("Peters") purchased six (6) Units in Regent on December 30, 1982. While Oak and Regent were separate entities and subleased different properties from ABF, the two transactions were structured in an identical fashion. Crucial to both Partnerships was the execution by each investor therein ("Partner") of an instrument entitled "Assumption of Liabilities" (in each case hereinafter, the "Assumption Agreement"), which provided that the signing Partner was personally liable for his or her *pro rata* share of the minimum annual royalties otherwise payable by each of the Partnerships to ABF during the first two years of the Subleases in the event the Partnership elected to defer payment of those royalties, which both Oak and Regent elected to do. As a result, Osley's liability under his Assumption Agreement was $14,625 per Unit, or $87,750 in the aggregate, and Peters' liability under hers was $13,500 per Unit, or $81,000 in the aggregate.

Paragraph 4 of both Osley's and Peters' Assumption Agreement provided that the amount of royalties deferred thereunder became due and payable to ABF on the twelfth anniversary of the effective date of the Subleases, or December 31, 1994. Paragraph 7 of Osley's agreement and Paragraph 9 of Peters' each provided that the signing Partner waived the benefit of the statute of limitations, and Paragraph 10 of Osley's Agreement and Paragraph 12 of Peters' each provided, "This Agreement is governed by and construed under the laws of the State of New York." Neither Osley nor Peters made any payment of the amounts respectively due under their Assumption Agreements, and each of *Osley* and *Peters*, sounding in a single